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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ALFREDO OCAMPO BALTAZAR, Defendant and Appellant.	E028187 (Super.Ct.No. INF028702) O P I N I O N

APPEAL from the Superior Court of Riverside County. Randall Donald White, Judge. Affirmed but sentence modifications ordered.

Ronda G. Norris, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Pamela A. Ratner Sobeck, Supervising Deputy Attorney General, and Marilyn L. George, Deputy Attorney General, for Plaintiff and Respondent.

Following a jury trial, defendant Alfredo Ocampo Baltazar was convicted of attempted first degree murder (Pen. Code, §§ 187 & 664[1]) and it was found true that he inflicted great bodily injury upon the victim (§§ 1192.7, subd. (c)(8) & 12022.7, subd. (a)) and personally used a firearm during the commission of the crime (§§ 1192.7, subd. (c)(8) & 12022.53, subd. (d)). Defendant was sentenced to life in state prison with the possibility of parole and a consecutive 25 years to life. The trial court imposed actual victim restitution of $4,182 to the victim and $200,000 to the victim's insurance company, Pacificare. Additionally, the court imposed a $10,000 restitution fine.

On appeal, defendant contends (1) CALJIC No. 17.41.1 infringes upon the jury's deliberating process and deprived him of his constitutional right to a fair and impartial trial; (2) the trial court erred when it awarded victim restitution to Pacificare Insurance Company; and (3) his life term enhancement for use of a firearm violates the state and federal constitutional prohibition against cruel and unusual punishment.

FACTS

Defendant shot his sister's daughter on January 8, 1998, causing injuries to her side, neck, shoulder, abdomen, knees, and "private." The victim was in intensive care for a week and spent more than a month in the hospital. The parties stipulated the injuries suffered by the victim constituted great bodily injury.

During a police interview, defendant said that he had been living with his sister and her two daughters (one was the victim). He claimed that he and the 21-year-old victim

[1] All further statutory references are to the Penal Code unless otherwise indicated.

became romantically involved and the relationship lasted approximately six months. Defendant said that his sister made him move out of the house just before Thanksgiving because she had learned of the relationship. According to the victim, her mother asked defendant to move out of the house because he had developed a romantic interest in her (the victim). The victim denied any romantic relationship with defendant.

CALJIC NO. 17.41.1

Defendant contends that the trial court erred by instructing the jury with CALJIC No. 17.41.1 because the instruction infringed upon the deliberating process and deprived him of his constitutional right to a fair and impartial jury trial. We disagree.

Defendant reiterates the now popular argument attacking CALJIC No. 17.41.1 as infringing upon the deliberating process, invading the secrecy of the jury, and depriving him of his constitutional right to a fair and impartial jury trial. We disagree.

That instruction provides, "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." (CALJIC No. 17.41.1 (1998 new) (6th ed. 1996).)

The instruction requires the jury only to report matters that clearly constitute juror misconduct, for which dismissal is appropriate. (Pen. Code, § 1089; *People v. Daniels* (1991) 52 Cal.3d 815, 864; *People v. Collins* (1976) 17 Cal.3d 687, 696; *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333.)

As the California Supreme Court recently held, "Evidence Code section 1150, while rendering evidence of the jurors' mental processes inadmissible, expressly permits, in the context of an inquiry into the validity of a verdict, the introduction of evidence of 'statements made . . . within . . . the jury room.' . . . [S]tatements made by jurors during deliberations are admissible under Evidence Code section 1150 when 'the very making of the statement sought to be admitted would itself constitute misconduct.' [Citation.]" (*People v. Cleveland* (2001) 25 Cal.4th 466, 484.) This is what the instruction is aimed at, i.e., the reporting to the trial court of statements made by a juror to the effect that he or she will not follow the law. The instruction does not require the jurors to report any matter that the law views as confidential. As to the jury's power to nullify, we refer defendant to the California Supreme Court's recent statement in *People v. Williams* (2001) 25 Cal.4th 441.[2]

Finally, the record discloses that no misconduct was reported to the trial court, no jury deadlock occurred, and there were no holdout jurors. Therefore, even if we assume the instruction was defective, we cannot agree that it affected defendant's verdict. (See *People v. Molina* (2000) 82 Cal.App.4th 1329, 1335-1336.)

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[2] After an extensive review of the debate surrounding jury nullification, the *Williams* court concluded: "Jury nullification is contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law. . . . [¶] We reaffirm, therefore, the basic rule that jurors are required to determine the facts and render a verdict in accordance with the court's instructions on the law." (*People v. Williams*, *supra*, 25 Cal.4th at p. 463.)

We reject defendant's contention of structural error where there is no evidence to support the grievances alleged in his brief. The claimed adverse effect of the instruction on the jurors is pure speculation. (*People v. Molina*, *supra*, 82 Cal.App.4th 1329, 1335-1336.) "In the vast majority of cases, there is no jury misconduct. We do not see how an instruction that is not likely to come into play in most cases can constitute structural error requiring the reversal of every case in which it is given. We think that such a result would be, frankly, absurd." (*Id.* at p. 1335.) There was no report that a juror in this case did not follow the court's instructions or engaged in any type of misconduct. On August 29, 2000, at 2:23 p.m., the jury retired to begin deliberations. They requested 12 copies of the transcript. The following day, the jury resumed deliberations and asked two questions. At 3:32 p.m., they returned with a verdict. There is no evidence in the record that CALJIC No. 17.41.1 had any impact on the jury deliberations, nor will we infer that the jury instruction had any prejudicial impact on defendant. (*People v. Molina*, *supra*, 82 Cal.App.4th at p. 1336.) Thus, we conclude there was no reversible error in this case.

RESTITUTION ORDER

The probation report indicates the victim's medical and hospital bills, which were covered by her medical insurer Pacificare, totaled $200,000. Over defendant's objection, the trial court ordered him to pay restitution to Pacificare in the amount of $200,000. On appeal, defendant contends and respondent concedes that the trial court erred in ordering payment of restitution to Pacificare. (*People v. Birkett* (1999) 21 Cal.4th 226.) Accordingly, the trial court is directed to amend its order by directing defendant to pay the

$200,000 in restitution to the victim. (*Id.* at p. 246; *People v. Hove* (1999) 76 Cal.App.4th 1266, 1272-1273.)[3]

CRUEL AND UNUSUAL PUNISHMENT

Defendant contends the 25-year-to-life enhancement imposed pursuant to section 12022.53, subdivision (d), constitutes cruel and unusual punishment under our federal and state Constitutions. This same argument has been raised and rejected in *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212-1215; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16-19; and *People v. Martinez* (1999) 76 Cal.App.4th 489, 493-496. We agree with those courts and thus reject defendant's contention for the reasons stated therein.

Notwithstanding the above, defendant argues that the 25-year-to-life enhancement is unconstitutional as applied to him based on the test set forth in *People v. Dillon* (1983) 34 Cal.3d 441. However, as respondent points out, defendant failed to present a *Dillon* claim in the trial court. Because the determination of the applicability of *Dillon* in a particular case "is fact specific, the issue must be raised in the trial court" or else it is waived.

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[3] In his reply brief, defendant contends that the restitution order of $200,000 should be vacated and the case should be remanded to the trial court to determine the proper amount of restitution to be awarded to the victim. We disagree. First, we note that the case is being remanded to the trial court to amend its order to direct payment of restitution to the victim. Second, defendant has not challenged the amount awarded. Thus, he has waived any issue regarding the sufficiency of the evidence to support the amount of the award. And finally, we note that defendant raised this issue for the first time in his reply brief. Issues raised for the first time on appeal in a reply brief, denying respondent an opportunity to respond to the issue, will not be addressed on appeal. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10; *City of Costa Mesa v. Connell* (1999) 74 Cal.App.4th 188, 197; *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.)

(*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) Nonetheless, in order to forestall a subsequent claim of ineffectiveness of counsel, we will consider the issue.

The *Dillon* analysis considers both the nature of the offense and the offender. (*People v. Dillon*, *supra*, 34 Cal.3d 441, 479.) "The nature of the offense is viewed both in the abstract and in the totality of circumstances surrounding its actual commission; the nature of the offender focuses on the particular person before the court, the inquiry being whether the punishment is grossly disproportionate to the defendant's individual culpability, as shown by such factors as age, prior criminality, personal characteristics, and state of mind. [Citations.]" (*People v. Martinez*, *supra*, 76 Cal.App.4th 489, 494.)

In *Dillon*, a 17 year-old boy entered a marijuana farm with six of his classmates with the intent to steal some of the marijuana crop. The boy panicked, and shot and killed an armed man guarding the marijuana. He was convicted of attempted robbery and first degree murder under the felony-murder rule. The uncontradicted evidence showed the boy was childlike and unusually immature despite his age. Our state Supreme Court noted there was "ample evidence that because of his immaturity he neither foresaw the risk he was creating nor was able to extricate himself without panicking . . . ." (*People v. Dillon*, *supra*, 34 Cal.3d, 441, 488.) Both the jury and the trial court had expressed concern that the sentence imposed was excessive when compared to the boy's moral culpability. (*Id.* at p. 487.) The court also considered the sentence imposed with the "petty chastisements" given to the other participants in the marijuana raid, none of whom were convicted of any degree of homicide or sentenced to state prison. (*Id*. at p. 488.)

Here, defendant was a married, 35-year-old man with no prior record at the time of the shooting. However, he had threatened to kill the victim and the other members of the household. He had obtained a gun and ammunition a few days before the shooting and practiced shooting the weapon. He contacted friends and family in an attempt to ascertain the victim's whereabouts. On the day of the shooting, defendant checked out of his hotel, knowing that he would not be returning. At the time of the shooting, the victim did not know defendant was present and her back was towards him when he opened fire. Defendant shot the victim five times. Without a doubt, he showed his intent to kill her. The victim suffered great bodily injury and could have died as a result of defendant's actions.

Nonetheless, defendant tries to distinguish himself from the defendant in *People v. Martinez*, *supra*, 76 Cal.App.4th 489. In that case the defendant, a 23-year-old man, had no significant prior criminal record. Upon being ejected from a furniture store by the owner, defendant threatened to return and kill the owner, and in fact returned to the store 30 to 45 minutes later and shot the owner in the stomach. The owner was hospitalized for 13 days and underwent three surgeries. (*Id.* at pp. 492, 496-497.) Rejecting defendant's cruel and unusual punishment argument against his sentence, the court noted that defendant was not a minor and there was nothing to suggest he was "unusually immature emotionally or intellectually" as the defendant in *Dillon*. (*Id.* at p. 497, citing *People v. Dillon*, *supra*, 34 Cal.3d 441, 482, 483, 486, 488.) Other than telling the probation officer that he had not intended to kill the owner, defendant showed no signs of remorse for his actions. (*People v. Martinez*, *supra*, 76 Cal.App.4th 489, 496.)

In this case, defendant shot the victim five times, instead of one. The victim spent twice as much time in the hospital as the victim in *Martinez*. Although defendant claims to have been remorseful, the facts suggest otherwise. According to defendant, his remorse is demonstrated by the fact that he intended to kill himself after the shooting, but was unable to do so because the gun jammed. However, following the shooting, defendant hid from the police in a closet of an abandoned apartment suggesting that any intent to kill himself may have been an intent to avoid capture and arrest. Moreover, when defendant was interviewed by police later that day, he said he wanted to kill the victim and himself so that his sister (the victim's mother) would know how it felt to lose someone. Thus, as respondent points out, any intent to kill himself was part of his plan, not the result of any intense feeling of remorse for what he had done. Also, defendant's argument that his actions were the result of being denied "all communication with his very tightknit family" is called into question by his admitted jealousy upon seeing the victim with a new boyfriend.

Based on the above, defendant is clearly no Dillon. Accordingly, we conclude that the imposition of the 25-year-to-life enhancement in this case does not shock the conscience on this record. (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

DISPOSITION

The judgment is affirmed. The portion of the sentence which directs payment of restitution to the insurance company is reversed. On remand, the trial court is directed to amend its order by

directing defendant to pay the $200,000 (plus the amount already ordered to be paid to the victim) in restitution to the victim.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

GAUT
J.